NO. 49614-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN WILLIAMS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SKAMANIA COUNTY

The Honorable Brian Altman, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it treated Williams' Oregon attempted rape in the first degree as factually comparable to Washington's attempted rape in the second degree and sentenced Williams to life in prison as a two strike persistent offender.

2. Because it is not manifestly apparent that the convictions for second degree and fourth degree assault are based on separate and distinct acts, the fourth degree assault conviction violates the prohibition against double jeopardy under the Fifth Amendment to the United States Constitution and article I, § 9 of the Washington Constitution.

3. The trial court's finding that Williams had one prior conviction that qualified as a persistent offender qualifying sex offense violated Williams' right to due process and a jury determination of every element of the crime beyond a reasonable doubt.

4. Imposing a sentence of life without the possibility of release based upon the trial court's determination, by a preponderance of the evidence, that Williams had a prior conviction that qualifies as a persistent offender eligible sex offense violated his right to equal protection of the law.

5. Judgment and sentence section 2.2 incorrectly characterizes the two Oregon assaults as second degree assaults rather than the comparable Washington third degree assaults found by the trial court.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An out-of-state conviction may count as a prior offense for offender score calculation only if it is legally or factually comparable to a Washington offense. Where an Oregon attempted rape in the first degree is broader than Washington's attempted rape in the second degree and no admitted facts narrow the conviction to fall within the parameters of the Washington offense, did the trial court err in including Williams' Oregon attempted rape conviction in calculating his offender score and using the conviction to impose a second strike life sentence?

2. The jury was not instructed that the second degree assault and the fourth degree assault must be based on separate and distinct acts. If it is not manifestly apparent to the jury that the state was not seeking to impose multiple punishments for the same offense and that each count was based on a separate act, there is a double jeopardy violation. Should the conviction for fourth degree assault be vacated because it is not manifestly apparent the conviction is not based on the same act constituting the conviction for second degree assault?

3. A defendant has a Sixth Amendment right to a jury trial and a Fourteenth Amendment right to proof beyond a reasonable doubt of every fact that authorizes an increase in punishment. Did the trial court violate Williams' constitutional rights by imposing a sentence of life without the possibility of release based on the court's own finding, by a preponderance of the evidence, that Williams had once before been convicted of a persistent offender qualifying sex offense?

4. A statute implicating a fundamental liberty interest violates the Equal Protection Clause of the Fourteenth Amendment if it creates classifications that are unnecessary to further a compelling government interest. The government has an interest in punishing repeat offenders more harshly than first-time offenders, but for some crimes, the existence of prior convictions used to enhance the sentence must be proved to a jury beyond a reasonable doubt, and for others – like those at issue in the Persistent Offender Accountability Act (POAA) – the existence of prior convictions used to enhance the sentence need only be proved to a judge by a preponderance of the evidence. Does the POAA violate the Equal Protection Clause by providing lesser procedural protections than other statutes whose purpose is the same?

5. An offender is entitled to an accurate judgment and sentence free of scrivener's errors. Judgment and sentence section 2.2 contains scrivener's errors by listing two Oregon assaults found comparable to Washington assaults in the third degree inaccurately as assaults in the second degree and mislabeling them as class B felonies rather than the accurate class C felonies?

C. STATEMENT OF THE CASE

1. Charges and sentence

By a second amended information, the state charged Benjamin Williams with six offenses: rape in the second degree, rape of a child in the third degree, child molestation in the third degree, assault in the second degree, unlawful imprisonment, and assault in the fourth degree. CP 8-11. Specifically, the assault in the second degree alleged Williams committed an assault in furtherance of another felony. CP 9-10; RCW 9A.36.020(1)(e). The state also alleged the second degree assault and unlawful imprisonment as sexually motivated offenses. CP 9-11.

The court instructed the jury that although multiple instances were alleged for each offense, they had to be unanimous as to at least one incident for each offense to return a guilty verdict for the offense. CP 24. The jury was not told that the assault in the fourth degree had to be a

separate incident from the assault alleged in the second degree assault. CP 15-50.

The jury returned verdicts of guilty on each offense but did not find the alleged sexual motivation. CP 58, 60; RP 629-31. By special interrogatory, the jury found unlawful imprisonment as the supporting felony for the second degree assault. CP 61.

For sentencing purposes, the state and Williams included Williams' Oregon criminal conviction documents in their respective sentencing memorandum. CP 62-104, 105-43.

At sentencing, over Williams' objection, the court found Williams' 2005 Oregon conviction for attempted rape in the first degree factually comparable to Washington's attempted rape in the second degree. RP 644-47, 651-52; CP 145-48. The court also found, without objection from Williams, Williams' two Oregon second degree assault convictions legally comparable to Washington's third degree assaults. RP 651; CP 62-104, 105-43, 147. The court included the three Oregon offenses in the offender score calculation. RP 651; CP 147.The court sentenced Williams to life as a two-strike persistent offender with no possibility of release. RP 651-52; CP 148.

The court did not address whether the assault in the fourth degree was double jeopardy with the assault in the second degree. RP 634-52. The

court suspended the fourth degree assault maximum 364-day sentence and ran it consecutive to all of Williams' other sentences. CP 148.

Although the court recognized the two Oregon assaults as comparable to Washington third degree assaults, it listed the offenses as second degree assaults on the criminal history section of Williams' judgment and sentence and classified them as class B felonies. CP 148.

Williams appeals all portions of his judgment and sentence. CP 159-72.

2. Trial testimony

J.A.P., Marissa Burton, and Jahda Holbert had been friends since elementary school. RP 200. Fifteen year-old J.A.P. spent a lot of time at the trailer home Marissa shared with her grandparents, her mother Ruanna Johnson, and her brother. RP 254. On March 22, 2014, J.A.P. met Ms. Johnson's boyfriend, Benjamin Williams, age 32, for the first time. RP 230-31, 256.

Over the course of the evening, Williams spent time with J.A.P. and his two teenage friends both together and separately. RP 187-89, 207-09, 265, 267, 273.

As the evening wore on, J.A.P. joined Williams alone in Ms. Johnson's bedroom. J.A.P. said Williams locked the door. RP 273. Williams

struck J.A.P. multiple times on the head and face while telling him he was no better than Ms. Johnson's son, Maurice. RP 274-81, 521. Per J.A.P., Williams then used his body weight and his knees to hold him down. RP 283, 293. Williams forced his penis into J.A.P.'s mouth and into J.A.P.'s anus, and then gave masturbated J.A.P. until J.A.P. ejaculated. RP 285-302. All of this was done against J.A.P.'s will. Id. J.A.P. left the bedroom only after Ms. Johnson pounded on the door and entered the room. RP 191, 209, 302.

Jahda Holbert and Marissa Butler described J.A.P.'s actions and appearance when he came out of the bedroom. He looked pale, he quickly collected his things, and he ran from the trailer. RP 191-93, 210-11. They followed J.A.P. down the road. Id. J.A.P. asked that they go to another friend's house so he could talk to Amber Bishop, a friend's mother. RP 193, 211, 226. They did so. Id. J.A.P. told her his version of events, and she called the police. RP 227, 306. Members of the Skamania County Sheriff's Office responded to the call and began an investigation. RP 370, 388.

Post arrest, Williams spoke with Deputy Lyle and denied that anything happened with J.A.P. RP 370-71. Camas Police Officer Gary Manning, who was at that time a Skamania County deputy, interviewed Williams later the next evening. RP 400. Officer Manning recorded the interview. RP 407. Late in the interview, Williams told Officer Manning that

J.A.P. left the bedroom after he hit J.A.P. on the face and head several times. RP 435-42. J.A.P., who identified as gay, returned and suggested to Williams they engage in the oral-genital and penile-anal contact. RP 252, 447, 468, 472. J.A.P. put Williams' penis into his mouth and Williams put his penis into J.A.P.'s anus. Both acts lasted mere seconds. RP 468, 471, 548. Williams also masturbated J.A.P. to ejaculation at J.A.P.'s request. RP 468. J.A.P. left the room after Ms. Johnson came into the room. RP 469. Williams denied ever locking the door. RP 527.

Williams testified and reiterated his contact with J.A.P.'s mouth, anus, and penis were all done at the request of J.A.P. RP 471-42. Williams did not identify as gay. RP 547. He expressed remorse for striking J.A.P. and having consensual sexual contact with J.A.P. RP 549-50. He denied using any force during the sexual contact or doing anything to restrain J.A.P. or prevent J.A.P. from leaving the bedroom. RP 523-27.

D. ARGUMENT

Issue 1. Williams was improperly sentenced as a second strike persistent offender because his prior Oregon conviction for attempted rape in the first degree is not legally or factually comparable to Washington's attempted rape in the second degree.

a. Williams' criminal history does not qualify him as a two strike persistent offender.

Under RCW 9.94A.570, a persistent two strike offender shall be sentenced to a term of total confinement for life without the possibility of release. A persistent offender, as applicable in the present case, is an individual who

> Has been convicted of: (A) Rape in the first degree, rape of a child in the first degree, child molestation in the first degree, rape in the second degree, rape of a child in the second degree, or indecent liberties by forcible compulsion; … or (C) an attempt to commit any crime listed in this subsection (38)(b)(i); and (ii) Has, before the commission of the offense under (b)(i) of this subsection, been convicted as an offender on at least one occasion, whether in this state or elsewhere, of an offense listed in (b)(i) of this subsection or any federal or out-of-state offense or offense under prior Washington law that is comparable to the offenses listed in (b)(i) of this subsection.

RCW 9.94A.030(38)(b)(i).

A Washington conviction for an offense listed under RCW 9.94A.030(38)(b)(i), obviously, will apply toward a sentencing court's analysis of criminal history for purposes of sentencing as a two strike

persistent offender. RCW 9.95A.525. Thus, Williams' current conviction for rape in the second degree is a qualifying strike offense.

A conviction from another state can count as a comparable offense for two strike scoring purposes but only if the offense is legally or factually comparable to one of the offenses listed in RCW 9.94A.030(38)(b)(i). *In re Personal Restraint of Lavery*, 154 Wn.2d 249, 254, 111 P.3d 837 (2005). At sentencing, the court accepted the state's argument that Williams' 2005 Oregon attempted rape in the first degree is factually comparable to Washington's attempted rape in the second degree. RP 651-62. But the comparability finding is wrong.

b. <u>The state cannot satisfy its burden of proving factual comparability of Williams' Oregon attempted rape</u>.

The state bears the burden of proving by a preponderance of the evidence that the record supports the existence and classification of out-of-state convictions. *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). Information provided in support of the state's burden must have some minimum indicia of reliability beyond mere allegation and must have some basis in the record. *Id.* at 481-82. The defendant has no burden of disproving state assertions which are unsupported by evidence. *Id*. The statutes in effect at the time the defendant committed

the foreign offense controls the court's analysis. *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). Questions regarding the comparability of offenses present issues of law reviewed de novo. *State v. Stockwell*, 159 Wn.2d 394, 397, 150 P.3d 82 (2007).

c. Williams' 2005 Oregon attempted rape in the first degree does not factually compare to Washington's attempted rape in the second degree.

To determine whether a foreign conviction is legally comparable to a Washington offense, the court must examine whether the elements of the foreign offense are substantially similar to the requisite Washington offense. *Lavery*, 154 Wn.2d at 255. Offenses are not legally comparable where the foreign offense covers a broader range of illegal activity than the Washington offense. *State v. Latham*, 183 Wn. App. 390, 397, 335 P.3d 960 (2014).

In making its factual comparison, the sentencing court may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt. Offenses are factually comparable "if the defendant's conduct constituting the foreign offense *as evidenced by the undisputed facts in the record* would constitute the Washington offense." *Id*. (emphasis added). In the examination of factual comparability, a court may only consider those facts which were proved to a finder of fact

beyond a reasonable doubt in the foreign conviction, or those to which the defendant admitted or stipulated. *Id*. The key consideration for a sentencing court is whether a defendant could have been convicted under the Washington statute had the same acts occurred in Washington. *State v. Thomas*, 135 Wn. App. 474, 485, 144 P.3d 1178 (2006).

While the sentencing court can look to the charging document for evidence of comparability, the focus of the analysis is always the elements of the crime as set forth in the statute. *Thomas*, 135 Wn. App. at 485. Importantly, where facts alleged in the charging document are not directly related to the elements of the offense under statute the sentencing court may not assume that all facts necessary for comparability have been proven or admitted. *Id*. at 486.

The state provided in its sentencing memorandum Williams' Oregon indictment, pre-trial offer, judgment of conviction and sentence, commit order, petition to enter a plea of guilty, and amended judgment of conviction and sentence. CP 105-143. The Indictment specifies, "[S]aid Defendant on or about February 5, 2005, in Wasco County, State of Oregon, did unlawfully and intentionally attempt, by forcible compulsion,

to engage in sexual intercourse with [S.M.][1]" in violation of ORS 163.375 and ORS 161.405. CP 118. Williams' only adoption of facts as to the attempted rape are written on his Petition to Enter a Plea of Guilty.

> I plead guilty on the basis of the fact that in Wasco County, Oregon, I did the following: On or about 2/5/05 I did unlawfully [and] intentionally attempt, by forcible compulsion, to engage in sexual intercourse with [S.M.] [and] as part of the same act and transaction I did unlawfully and recklessly cause physical injury to [S.M.].

CP 124.

A sentencing court properly can consider facts conceded by the defendant in a guilty plea as an admitted fact. *State v. Arndt*, 179 Wn. App. 373, 382-83, 320 P.3d 104 (2014).

Williams' statement fails to prove comparability to a Washington attempted rape in the second degree for two reasons. First, a person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he does any act which is a substantial step toward the commission of that crime. RCW 9A.28.020(1). RCW 9A.28.020(1) provides,

> A person is guilty of an attempt to commit a crime if, *with intent to commit a specific crime*, he or she does any act which is a substantial step toward the commission of that crime.

[1] The name is redacted to reflect initials in order to maintain witness privacy.

Williams' Oregon plea statement fails to articulate a substantial step.

Second, in Washington, a person is guilty of rape in the second degree when the person engaged in sexual intercourse with another person by forcible compulsion. RCW 9A.44.050(1)(a).[2] Offenses are factually comparable "if the defendant's conduct constituting the foreign offense *as evidenced by the undisputed facts in the record* would constitute the Washington offense." *Arndt*, 179 Wn. App. at 382-83. (emphasis added). While the sentencing court can look to the charging document for evidence of comparability, the focus of the analysis is always the elements of the crime as set forth in statute. *Id*. Importantly, where facts alleged in the charging document are not directly related to the elements of the offense under statute, the sentencing court may not assume that all facts necessary for comparability have been proven or admitted. *Id*. at 486.

The state argued the inclusion of the term "forcible compulsion" in the Oregon plea is what makes the admitted conduct of Williams factually comparable to Washington's attempted rape in the second degree. But the state's analysis is misplaced. "Forcible compulsion" is a

[2] There are other alternatives of rape in the second degree. None of which are relevant to Williams' 2005 Oregon plea.

legal term of art the use of which fails to tell the reader what Williams actually did. In doing a factual comparability analysis, it is not enough to say that because two states use of the same legal terms of art, here "forcible compulsion," that the states' application of the term is, without more, factually comparable.

Oregon's definition of forcible compulsion is broader than Washington's definition. Per O.R.S. 163.305(2)(a)

> "Forcible compulsion" means *to compel* by (a) Physical force; or (b) A threat, express or implied, that places a person in fear of immediate or future death or physical injury to self or another person, or in fear that the person or another person will immediately or in the future be kidnapped.

But, RCW 9A.44.010(6) provides,

> "Forcible compulsion" means physical force *which overcomes resistance*, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.

(emphasis added). Washington's requirement of physical force to overcome resistance distinguishes it from Oregon's requirement to compel by force. Less force than is required by Washington could satisfy the Oregon definition. For example, in Oregon, holding someone down to compel them to engage in sexual intercourse, but with no victim

resistance, could be a crime in Oregon but would not be a second degree rape in Washington. Washington's definition of forcible compulsion requires proof of overcoming resistance. Williams, in his plea statement, simply wrote that he attempted "by forcible compulsion" to engage in sexual intercourse with S.M. Without more, that statement alone does not prove factual comparability to Washington's attempted rape in the second degree. Qualifying prior convictions for persistent offender status must strictly comply with the list of offenses found in former RCW 9.94A.030(38)(b)(i). *State v. Delgado,* 148 Wn.2d 723, 726–27, 63 P.3d 792 (2003).

d. Remand for resentencing without inclusion of the Oregon attempted rape in the offender score calculation is the correct remedy.

If a court concludes that a prior, foreign conviction is neither legally nor factually comparable, it may not count the conviction as a strike under the POAA. *Lavery,* 154 Wn.2d at 258. "[A]remand for an evidentiary hearing is appropriate only when the defendant has failed to specifically object to the state's evidence of the existence or classification of a prior conviction." *State v. Lopez,* 147 Wn.2d 515, 520, 55 P.3d 609 (2002). But where, as here, "the defendant raises a specific objection and 'the disputed issues have been fully argued to the sentencing court, we

hold the State to the existing record.'" *Id.* at 520, 55 P.3d 609 (alteration in original) (quoting *Ford,* 137 Wn.2d at 485, 973 P.2d 452); *State v. Knippling*, 141 Wn. App. 50, 56–57, 168 P.3d 426 (2007), *aff'd,* 166 Wn. 2d 93 (2009).

Issue 2. In violation of double jeopardy, the record does not show that the conviction for fourth degree assault is based on a separate and distinct act different from the conviction for second degree assault.

a. Double jeopardy forbids punishment for the same offense. When two counts may constitute the same offense, the record must show it was manifestly apparent to the jury that the offenses are based on separate acts.

The constitutional prohibition against double jeopardy forbids imposition of multiple punishments for the same offense. U.S. Const. Amend. V; art. I, § 9; *State v. Mutch*, 171 Wn.2d 646, 661, 254 P.3d 803 (2011). A double jeopardy claim may be raised for the first time on appeal. *Id*. at 661. Double jeopardy issues are reviewed de novo. *Id*. at 662.

Jury instructions which permit the jury to convict a defendant of two crimes that are the same offense create the possibility of a double jeopardy violation. *State v. Borsheim*, 140 Wn. App. 357, 366-67, 165 P.3d 417 (2007). This can occur when the defendant is convicted of two crimes

if the two crimes are the same in fact and in law. *State v. Land*, 172 Wn. App. 593, 600, 295 P.3d 782 (2013).

Jury instructions should make it "manifestly apparent" that multiple punishments for the same offense are not being sought. *Borsheim*, 140 Wn. App. at 367. When there is a risk of a double jeopardy violation due to multiple counts during the same charging period, the jury should be told each count requires proof of a different act. *Id.* at 367. This should be done by instructing the jury it must find the criminal act was "separate and distinct" from other charged acts. *See Id.* at 368; 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 4.25 cmt. (4th Ed). Simply giving the jury a unanimity instruction or the standard "separate crime" instruction is inadequate. *Mutch*, 171 Wn.2d at 662-63; *Borsheim*, 140 Wn. App. at 367. In determining whether there is a double jeopardy violation, the entire record is considered. *Mutch*, 171 Wn.2d at 664. "Review is rigorous and is among the strictest." *Id*.

b. The second degree and the fourth assault convictions may constitute the same offense. The record does not make it manifestly apparent that the convictions are based on separate and distinct acts. Because this violates double jeopardy, the fourth degree assault conviction should be vacated.

Included in Williams' charges was one count of second degree assault (count 4) and one count of fourth degree assault (count 5). CP 9-12. The jury instructions informed the jury that Williams could be found guilty of second degree assault if they found he "assault[ed] another with intent to commit a felony." CP 37 (Instruction 21). The jury instruction for fourth degree assault informed the jury "a person commits the crime of assault in the fourth degree when he or she commits an assault." CP 43 (Instruction 27).

Fourth degree assault is a lesser included offense of second degree assault and is thus the same offense in law. *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 982 n.3, 329 P.3d 78 (2014). The jury convicted Williams of both the second degree assault and the fourth degree assault. CP 56-57. As instructed, the conviction for fourth degree assault violates double jeopardy because it may be based on the same facts constituting the second degree assault. *Villanueva-Gonzalez*, 180 Wn.2d at 978, 985-86 (convictions for second degree assault and fourth degree assault based on same course of conduct violated double jeopardy).

The jury instructions did not tell the jury the assault in the fourth degree had to be a separate assault from that underlying the second degree assault. Instead, the instructions told the jury only that they were to decide each count separately and that they had to be unanimous on the act that constituted each crime.

> A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other court.

CP 20 (Instruction 4).

This standard "separate crime" instruction, which told the jury it "must decide each count separately" and that its "verdict on one count should not control your verdict on any other count" is inadequate to fully mitigate the risk of a double jeopardy violation. CP 19 (Instruction 4). *Mutch*, 171 Wn.2d at 662-63; *Borsheim*, 140 Wn. App. at 367.

The unanimity on acts instruction similarly did not put the jury on notice they must find a distinct act of assault to support both fourth degree assault and second degree assault.

> The State alleges that the defendant committed acts of Rape Second Degree, Rape of a Child Third Degree, Assault Second Degree with Sexual Motivation, and Assault Fourth Degree on multiple occasions. To convict the defendant on any count of Rape Second Degree, Rape of a Child Third Degree, Assault Second Degree with Sexual Motivation, and Assault Fourth Degree, one particular act of Rape

> Second Degree, Rape of a Child Third Degree, Assault Second Degree with Sexual Motivation, and Assault Fourth Degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Rape Second Degree, Rape of a Child Third Degree, Assault Second Degree with Sexual Motivation, and Assault Fourth Degree.

CP23 (Instruction 8).

In additional to the instructions, the testimony, and the argument of counsel did not make it manifestly apparent that the two assault convictions were based on an act separate and distinct from each other.

J.A.P. testified to many instances of slapping, hitting, using force to control, and unwanted sexual touching, any of which could constitute an intentional touching sufficient to satisfy both the assault in the second degree assault and the fourth degree assault. RP 274-302.

Williams testified to multiple instances of assault and conceded his guilt to assault in the fourth degree. RP 521, 546, 604, 619-20. In his concession, Williams specified no set instance of assault leaving open for the jury's consideration multiple instances of assault for which it had to find a single agreeable instance for unanimity. RP 603-20. Williams also did not distinguish the difference between an assault for fourth degree purposes from an assault for second degree purposes. RP 603-20.

Instead, Williams simply argued facts did not support a finding that any of the assaults were done in furtherance of the assault in the second degree. RP 619-20.

In closing argument, the state did not elect specific instances of assault for the jury's consideration. RP 590-603, 620-26. "[J.A.P.] was struck five, six, seven times, something like that, physically. All of those could be an assault." RP 598. Instead, contrary to double jeopardy concerns, the state's argument encouraged the jury to settle on a single assault allegation and use it to return a unanimous verdict on both assaults.

> [B]ut this is an example of how you commit, smacking somebody, right, which would, normally, just be an assault four; could turn into an assault two, because of why you're doing it, and, if you believe the reason Mr. Williams was assaulting [J.A.P.], was either to keep him in that room, so that he could talk to him; keep him in that room so that that he could rape him; keep him in that room so that he could molest him; then he committed assault in the second degree. You just have to choose one of those crimes[.]

RP 600.

To ensure no double jeopardy violation, an instruction must be given telling the jury that the acts which constituted the assault in the second degree and the assault in the fourth degree must be separate and

distinct conduct. When jury instructions are inadequate to protect against the potential double jeopardy violation, only in "rare circumstance[s]" will it be manifestly apparent that the jury's verdict on the multiple counts rest on separate and distinct acts. *Mutch*, 171 Wn.2d at 665. In *Mutch*, such rare circumstances were present because the information, instructions, testimony, and argument convinced the court beyond a reasonable doubt that the five convictions for rape were based on separate and distinct acts. *Id.* at 663-65. The record showed the prosecutor discussed the five acts during closing and the defendant only raised a defense of consent. *Id*.

Unlike *Mutch*, this is not a "rare" case where the record proves beyond a reasonable doubt that the two convictions for assault are premised on separate and distinct acts. Because the record does not prove beyond a reasonable doubt there is no double jeopardy violation this Court should reverse and vacate the conviction for fourth degree assault. *Mutch*, 171 Wn.2d at 664; *Borsheim*, 140 Wn. App. at 370-71. To assure that double jeopardy proscriptions are carefully observed, a judgment and sentence must not include any reference to the vacated conviction. *State v. Turner*, 169 Wn.2d 448, 464-65, 238 P.3d 461 (2010).

Issue 3. The sentencing court violated Williams' Sixth Amendment right to a jury trial and Fourteenth Amendment right to proof beyond a reasonable doubt by imposing a two strike life sentence based on the court's finding, by a preponderance of the evidence, that Williams had previously been convicted of a two strike sex offense.

a. Under the Sixth and Fourteenth Amendments, a defendant has a right to a jury determination and proof beyond a reasonable doubt of any fact that increases his maximum sentence.

The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of a crime charged beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The Sixth Amendment provides the right to a jury in a criminal trial. U.S. Const. Amend. VI; *Blakely v. Washington*, 542 U.S. 296, 298, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Together these constitutional clauses guarantee the right to have a jury find, beyond a reasonable doubt, every fact essential to punishment – whether or not the fact is labeled an "element." *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). It violates the constitution "for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Id*. Moreover, "such facts must be established by proof beyond a reasonable doubt." *Id.*

As the United States Supreme Court recently explained,

> [A]ny possible distinction between an "element" of a felony offense and a "sentencing factor" was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding. Accordingly, we have treated sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt.

Washington v. Recuenco, 548 U.S. 212, 220, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). Here, the prior conviction found by the court increased Williams' sentence to life without the possibility of release and was an element of the offense required to be proved to a jury beyond a reasonable doubt.

b. Williams had the constitutional right to have a jury determine beyond a reasonable doubt he committed the prior 'strike' offense because it increased his maximum sentence.

Absent the court's finding, by a preponderance of the evidence, that he committed a "strike" offense on one prior occasion, Williams would not have been subject to a sentence of life without the possibility of release. The jury verdict for rape in the second degree supports no life sentence standing alone. *See* CP 148 (setting forth standard range of 210 to 280 months). Because the facts used to impose the life sentence were

not found by a jury beyond a reasonable doubt, Williams' Sixth and Fourteenth Amendment rights were violated.

The state may argue that the facts that increased Williams' sentence fall within a "prior conviction exception." *See Apprendi*, 530 U.S. at 489. This argument overlooks important distinctions and developments in United States Supreme Court jurisprudence.

First, the Supreme Court has implicitly overruled the case on which this supposed exception was based, *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998).[3] In *Apprendi*, the Court recognized there was no need to explicitly overrule *Almendarez-Torres* to resolve the issue before it. However, the Court reasoned, "it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested." 530 U.S. at 489. The *Apprendi* Court described *Almendarez-Torres* as "at best an exceptional departure" from

[3]Williams recognizes that the Washington Supreme Court has declined to apply *Apprendi* in the context of prior conviction enhancements until the United States Supreme Court explicitly overrules *Almendarez-Torres*. *State v. Smith*, 150 Wn.2d 135, 143, 75 P.3d 934 (2003). As the court recognized in *State v. Anderson*, Williams respectfully contends the time to do so has arrived and urges this Court to take the first step. *See, e.g.*, *State v. Anderson*, 112 Wn. App. 828, 839, 51 P.3d 179 (2002) (Court of Appeals need not follow Washington Supreme Court decisions that are inconsistent with cited United States Supreme Court opinions).

the historic practice of requiring the state to prove to a jury beyond a reasonable doubt each fact that exposes the defendant to an increased penalty. *Apprendi*, 530 U.S. at 487.

A member of the 5-justice majority in *Almendarez-Torres*, Justice Thomas has since retreated from the majority holding. His *Apprendi* concurrence noted extensively the historical practice of requiring the state to prove every fact, "of whatever sort, including the fact of a prior conviction," to a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring). As Justice Thomas noted, "a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided." *Shepard v. United States*, 544 U.S. 13, 27, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005) (Thomas, J., concurring).

Even if *Almendarez-Torres* has precedential value, it is distinguishable on several grounds. First, the issue in *Almendarez-Torres* was the sufficiency of the charging document, not the right to a jury trial or proof beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 488; *Almendarez-Torres*, 523 U.S. at 247-48. Second, *Almendarez-Torres* dealt with the "fact of a prior conviction." *Apprendi*, 530 U.S. at 490. Here, the simple "fact" of the prior convictions did not increase Williams' punishment; rather, it was the "type" of prior conviction that mattered.

To impose a life sentence, the state must prove the defendant has been convicted of a specific "most serious" sex offense on one prior occasion. RCW 9.94A.030(38); RCW 9.94A.570. Third, the *Almendarez-Torres* court noted the fact of prior convictions triggered an increase in the maximum *permissive* sentence: "[T]he statute's broad permissive sentencing range does not itself create significantly greater unfairness" because judges traditionally exercise discretion within broad statutory ranges. 523 U.S. at 245. Here, in contrast, the alleged prior conviction led to a *mandatory* sentence of life without the possibility of release, a sentence much higher than the 280 month top of the permissive standard range. CP 147; RCW 9.94A.570. Accordingly, even if *Almendarez-Torres* were still good law, it would not apply here.

In a case from this division, Judge Quinn-Brintnall recognized that Supreme Court precedent requires the state to prove prior "strike" offenses to a jury beyond a reasonable doubt. *State v. McKague*, 159 Wn. App. 489, 525-35, 246 P.3d 558, *aff'd on other grounds*, 172 Wn.2d 802 (2011) (Quinn-Brintnall, J., concurring in part and dissenting in part). Although the Washington Supreme Court has rejected the argument Williams makes here, Judge Quinn-Brintnall noted that subsequent United States Supreme Court cases clarified the meaning of the Sixth and

Fourteenth Amendment rights set forth in *Apprendi* and invalidated our state's intervening case law. *Id*. at 530 (Quinn-Brintnall, J., dissenting) (citing *Blakely*, 542 U.S. at 303-04; *Cunningham v. California*, 549 U.S. 270, 281-88, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007)). Under recent United States Supreme Court cases, the "prior conviction exception does not apply in cases where the trial court wishes to impose a sentence in excess of the statutory maximum without a supporting jury verdict." *Id*. at 535. This Court, as suggested by Judge Quinn-Brintnall, should follow United States Supreme Court precedent and hold that prior "strike" offenses must be proved to a jury beyond a reasonable doubt.

c. Because the life sentence was not authorized by the jury's verdict, the case should be remanded for resentencing within the standard range.

Imposing a sentence not authorized by the jury's verdict requires reversal. *State v. Williams-Walker*, 167 Wn.2d 889, 900, 225 P.3d 913 (2010) (reversing sentence enhancement where jury not asked to find facts supporting it, even though overwhelming evidence of firearm use was presented). The jury did not find beyond a reasonable doubt the facts to support the sentence of life without the possibility of release imposed upon Williams. His sentence should be reversed and remanded for the imposition of a standard range sentence.

Issue 4. The classification of the persistent offender finding as a 'sentencing factor' that need not be proved to a jury beyond a reasonable doubt violates the Equal Protection Clause of the Fourteenth Amendment.

a. Strict scrutiny applies to the classification at issue because a fundamental liberty interest is at stake.

The Equal Protection Clause of the Fourteenth Amendment requires that similarly situated individuals be treated alike with respect to the law. U.S. Const. Amend. XIV; *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). When analyzing equal protection claims, courts apply strict scrutiny to laws implicating fundamental liberty interests. *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). Strict scrutiny requires the classification at issue be necessary to serve a compelling state interest. *Plyler*, 457 U.S. at 217.

The liberty interest at issue here – physical liberty – is the prototypical fundamental right; it is the one embodied in the text of the Fourteenth Amendment. "[T]he most elemental of liberty interests [is] in being free from physical detention by one's own government." *Hamdi v. Rumsfeld*, 542 U.S. 507, 529, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004). Thus, strict scrutiny applies to the classification. *Skinner*, 316 U.S. at 541; *cf*. *In re Det. of Albrecht*, 147 Wn.2d 1, 7, 51 P.3d 73 (2002) (applying

strict scrutiny to civil commitment statute in face of due process challenge, because civil commitment constitutes "a massive curtailment of liberty").

b. Under any standard of review, the classification at issue here violated the Equal Protection Clause.

Notwithstanding the above rules, Washington courts have applied rational basis scrutiny to equal protection claims in the sentencing context. *State v. Manussier*, 129 Wn.2d 652, 672-73, 921 P.2d 473 (1996). Under this standard, a law violates equal protection if it is not rationally related to a legitimate government interest. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).

Although the proper standard of review is strict scrutiny, the result of the inquiry is the same regardless of the lens through which the Court evaluates the issue. Under either strict scrutiny or rational basis review, the classification at issue here violates the Equal Protection Clause because it is neither necessary to serve a compelling government interest nor rationally related to a legitimate government interest.

Our legislature has determined that the government has an interest in punishing repeat criminal offenders more severely than first-

time offenders. For example, defendants who have twice previously violated no-contact orders are subject to a significant increase in punishment for a third violation. RCW 26.50.110(5); *State v. Oster*, 147 Wn.2d 141, 146, 52 P.3d 26 (2002). Likewise, defendants who have once previously been convicted of specified "most serious" (sex) offenses are subject to a significant increase in punishment (life without release) for a second violation. RCW 9.94A.030(38); RCW 9.94A.570. However, courts treat prior offenses that cause the significant increase in punishment differently simply by labeling some "elements" and others "sentencing factors."

Where prior convictions that increase the maximum sentence available are classified as "elements" of a crime, they must be proved to a jury beyond a reasonable doubt. For example, a prior conviction for a felony sex offense must be proved to the jury beyond a reasonable doubt to punish a current conviction for communicating with a minor for immoral purposes as a felony. RCW 9.68A.090(2); *State v. Roswell*, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). Similarly, two prior convictions for violation of a no contact order must be proved to the jury beyond a reasonable doubt to punish a current conviction for violation of a no-contact order as a felony. RCW 26.50.110(5); *Oster*, 147 Wn.2d at 146.

And the state must prove to a jury beyond a reasonable doubt that a defendant has four prior DUI convictions in the last ten years to punish a current DUI conviction as a felony. RCW 46.61.502(6)(a); *State v. Chambers*, 157 Wn. App. 465, 475, 237 P.3d 352 (2010).

In none of these examples has the legislature labeled these facts as elements; the courts have simply treated them as such.

Where, as here, prior convictions that increase the maximum sentence available are classified as "sentencing factors," they need only be proved to the judge by a preponderance of the evidence. *Smith*, 150 Wn.2d at 143 (two prior strike offenses need only be proved to judge by a preponderance of the evidence to punish current strike as third strike), *cert. denied*, 541 U.S. 909 (2004)). Just as the legislature has never labeled the facts at issue in *Oster*, *Roswell*, or *Chambers* "elements," the legislature has never labeled the fact at issue here a "sentencing factor." Instead, in each instance it is an arbitrary judicial construct. This classification violates equal protection because the government interest in either case is *the same*: to punish repeat offenders more severely. *See* RCW 9.68.090 (elevating "penalty" for communication with a minor for immoral purposes based on prior offense); RCW 46.61.5055 (person with four prior DUI convictions in last ten years "shall be punished under RCW

ch. 9.94A"); *State v. Thorne*, 129 Wn.2d 736, 772, 921 P.2d 514 (1996) (purpose of POAA is to "reduce the number of serious, repeat offenders by tougher sentencing").

If anything, there might be a rational basis for requiring proof of prior convictions to a jury beyond a reasonable doubt in the "two strikes" sex offender context but not in other contexts, because the punishment in the "two strikes" context is the maximum possible (short of death). Thus, it might be reasonable for the Legislature to determine that the greatest procedural protections apply in that context but not in others. However, it makes no sense to say that the greater procedural protections apply where the necessary facts only marginally increase punishment, but need not apply where the necessary facts result in the most extreme increase possible.

As an example, if a person is alleged to have a prior conviction for first degree rape, the state must prove that conviction to a jury beyond a reasonable doubt in order to use the conviction to increase the punishment for a current conviction for communicating with a minor for immoral purposes – even if the prior conviction increases the sentence by only a few months. *Roswell*, 165 Wn.2d at 192. But, for example, if the same person with the same alleged prior conviction for first degree rape

is instead convicted of rape of a child in the first degree, the state need only prove the prior conviction to a judge by a preponderance of the evidence in order to increase the punishment for the current conviction to life without the possibility of release. RCW 9.94A.030 (38)(b) (two strikes for sex offenses); RCW 9.94A.570; *Smith*, 150 Wn.2d at 143.

A similar problem of arbitrary classifications caused the Supreme Court to invalidate a persistent offender statute for violating the Equal Protection Clause in *Skinner*, 316 U.S. at 541. Like the statute at issue here, the Oklahoma statute at issue in *Skinner* mandated extreme punishment upon a third conviction for an offense of a particular type. *Id*. at 536. While under Washington's act the extreme punishment mandated is life without the possibility of relase for certain second time commission of a sex offense, under Oklahoma's act the extreme punishment was sterilization. *Id*. The Court applied strict scrutiny to the law, finding that sterilization implicates a "liberty" interest even though it did not involve imprisonment. The statute did not pass strict scrutiny because three convictions for crimes such as embezzlement did not result in sterilization while three strikes for crimes such as larceny did. *Id*. at 541-42. Acknowledging that a

legislature's classification of crimes is normally due a certain level of deference, the Court declined to defer because:

> We are dealing here with legislation which involves one of the basic civil rights of man. … There is no redemption for the individual whom the law touches. … He is forever deprived of a basic liberty.

Id. at 540-41. The same is true here. Being free from physical detention by one's own government is one of the basic civil rights of man. *Hamdi*, 542 U.S. at 529. The legislation at issue here forever deprives Williams of this basic liberty based on proof by only a preponderance of the evidence to a judge and not by a jury verdict.

As the Supreme Court explained in *Apprendi*, "merely using the label 'sentence enhancement' to describe [one fact] surely does not provide a principled basis for treating [two facts] differently." *Apprendi*, 530 U.S. at 476. "The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn." *Skinner*, 316 U.S. at 542. This Court should hold that the trial judge's imposition of a sentence of life without the possibility of release, based on the court's finding of the necessary facts by a preponderance of the evidence, violated the equal protection clause. The case should be remanded for resentencing within the standard range.

Issue 5. Scrivener's errors in the judgment and sentence are correctible error.

a. Williams' scrivener's errors are ripe for appellate review.

A defendant may challenge an erroneous sentence for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). CrR 7.8(a) provides that clerical errors in judgments, orders, or other parts of the record may be corrected by the court at any time on its initiative or on the motion of any party. Scrivener's errors are clerical errors that result from mistake or inadvertence, especially in writing or copying something on the record. *In re Personal Restraint of Mayer*, 128 Wn. App. 694, 701, 117 P.3d 353 (2005).

b. The scrivener's errors in Williams' judgment and sentence should be remanded and corrected.

The court found two Oregon second degree assaults comparable to Washington third degree assault. RP 638-40, 651. The judgment and sentence, at section 2.2, lists both as second degree assaults as class B felonies rather than class C third degree assaults. CP 147-48. RCW 9.94A.525(3) requires, "Out-of-state convictions for offenses shall be classified according to the comparable offense definition and sentence provided by Washington law."

The remedy for a scrivener's error in a judgment and sentence is remand to the trial court for correction. CrR 7.8(a); *State v. Naillieux*, 158 Wn. App. 630, 646, 241 P.3d 1280 (2010). Williams' case should be remanded to correct the classifications as assaults in the third degree, class C felonies.

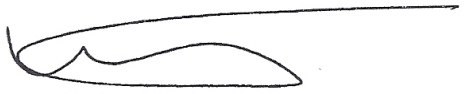
E. CONCLUSION

Williams should be remanded for resentencing. The Oregon attempted rape in the second degree should be stricken as it lacks comparability and Williams resentenced within his standard ranges. Also, the second degree assault and the fourth degree assault should be recognized as double jeopardy and any record of the fourth degree assault stricken from the judgment and sentence.

Finally, the amended judgment and sentence should be free of scrivener's error.

In the alternative, Williams' life sentence should be stricken given the lack of a jury's verdict supporting such a determination. Williams should be resentenced within his standard ranges.

Respectfully submitted August 12, 2017.



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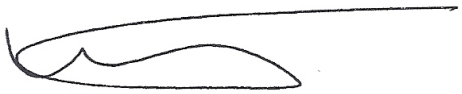
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Brief of Appellant to (1) Skamania County Prosecutor's Office, at kick@co.skamania.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to Benjamin Williams/DOC#393349, Washington State Penitentiary, 1313 N. 13th Ave., Walla Walla, WA 99362.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed August 12, 2017, in Winthrop, Washington.



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